

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA STATE LOTTERY

In the Matter of P & A Enterprise,
Inc., Retailer #286260

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDED DECISION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:15 a.m. on Tuesday, January 25, 2000, at the Office of the Minnesota State Lottery at 2645 Long Lake Road in the City of Roseville, Minnesota. The record closed on the date of the hearing.

E. Joseph Newton, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared representing the Minnesota State Lottery. Tariq Mahmood, Manager, P & A Enterprise, Inc., 9445 Lyndale Avenue South, Bloomington, MN 55420, appeared for P & A Enterprise, Inc. ("the Respondent").

NOTICE

This Report is a recommendation, not a final decision. The Director will make the final decision after a review of the record. The Director may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Director shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Director. Parties should contact Dale McDonnell, Legal Counsel, Minnesota State Lottery, 2645 Long Lake Road, Roseville, Minnesota 55113, (651-635-8231) to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issues presented in this case are whether or not the Respondent complied with the statute and rules governing retailers selling lottery tickets, and the terms of its contract with the State Lottery, by properly accounting for the proceeds from the sale of lottery tickets and by complying with the terms and conditions of its contract.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Lottery and the Respondent initially entered into an agreement in April, 1998, under which the Respondent was authorized to sell lottery tickets. The contract was renewed on April 12, 1999.^[1] It was also amended on June 3, 1999.^[2]

2. The contract provides in part that the Director of the Lottery must cancel, suspend or not renew the contract if the retailer fails to account for proceeds from the sale of instant lottery tickets, the retailer fails to comply with the terms of the contract, or the retailer fails to pay the lottery in a timely manner for the sale of lottery tickets as required by Lottery procedures.^[3]

3. The contract also provides that:

- a. The RETAILER agrees to maintain a separate account in a designated bank. All monies received by the RETAILER from the sale of instant lottery tickets, less the amount retained as compensation for the sale of instant lottery tickets or credit for the direct payment of prizes, must be deposited into this account prior to the weekly electronic funds transfer (EFT) transaction. Monies in this account must be accessible at all times with no limitations in the number of transactions.
- b. The RETAILER agrees that if a check or electronic transfer of the RETAILER is dishonored, the RETAILER will pay a service charge of up to twenty dollars (\$20.00) as set by the LOTTERY, plus interest from the designated day of collection at the rate established by rule.
- c. The account the RETAILER uses for LOTTERY transactions must be subject to electronic funds transfer for payment of amounts due to the LOTTERY, unless otherwise authorized by the LOTTERY.
- d. The RETAILER agrees to make prompt settlement of all amounts due and owing the LOTTERY according to procedures established by the LOTTERY.^[4]

4. Every Wednesday, the State Lottery electronically sweeps lottery proceeds from the trust accounts of participating retailers. The sweep is based upon the ticket sale information transferred electronically to the Lottery by the retailer. If there are not sufficient funds (NSF) to permit the sweep, the bank notifies the Lottery on the following Monday.

5. The Respondent had its first NSF sweep in August of 1998. The Lottery contacted the Respondent and advised it of the problem. The NSF amount, together with a penalty and interest, were then included in the sweep the following Wednesday and it was collected.

6. This pattern was repeated again in September of 1998, October of 1998, twice in November of 1998, once in January of 1999, and twice in February of 1999. On each occasion the Respondent had an NSF sweep that was collected the next week.

7. The retailer roundtable committee of the Lottery reviewed the Respondent's situation in February or March of 1999 and decided to place the Respondent on a "COD" basis. This meant that it had to pay for tickets in advance and pay any debts weekly at the Lottery office. The Respondent was placed on a COD basis for six months beginning in March of 1999. It made payments to the Lottery office in a satisfactory manner.

8. In June of 1999 the committee decided to end the COD arrangement and to place the Respondent back on a regular sweep basis.

9. The Lottery contacted Mr. Mahmood in late July 1999 and advised him that the Respondent was being placed back on a regular sales/sweep basis and that he would need to provide a bank account number. Mr. Mahmood was also advised that the Lottery could suspend him if there was another NSF situation.^[5]

10. The Lottery sent a certified letter dated August 10, 1999 to the Respondent advising it to provide a bank account number by August 23, 1999 and advising the Respondent that "if you have any more NSF's before March of 2000, you will be suspended."^[6] The certified receipt indicates that the letter was received by someone at Respondent's address on August 11, 1999.

11. On December 13, 1999 the Lottery received notice from the Respondent's bank that its account was NSF for the December 9, 1999 sweep. Once again the NSF amount with a penalty and interest were placed on the next week's sweep and were paid.

12. The retailer billing statement sent to the Respondent with a statement date of December 13, 1999 showed a non-sufficient funds report in the amount of \$1,770.17.^[7]

13. The only reason offered by the Respondent for the NSF situations was a failure to deposit the funds promptly.

14. The retailer roundtable committee considered the Respondent's situation again in December of 1999 and decided to temporarily suspend the Respondent's contract. The director of the Minnesota State Lottery issued an order temporarily suspending the Respondent's contract on December 20, 1999.^[8] In late December the Lottery picked up the tickets and equipment from the Respondent's store.

15. The Respondent made a timely request for a hearing.

16. On January 12, 2000 the director of the Minnesota State Lottery issued a Notice of and Order for Hearing, together with an attached statement of charges setting this matter on for hearing on January 26, 2000. The notice indicated that the hearing would be held for the purpose of determining whether the Lottery should cancel or suspend the Respondent's Lottery retailer contract and/or take other disciplinary action against the Respondent.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Director of the Minnesota State Lottery have jurisdiction in this matter pursuant to Minn. Stat. § § 14.50 and 349A.06, subd. 11.

2. The Notice of Hearing issued by the Lottery was proper and the Lottery has fulfilled all relevant substantive and procedural requirements of law or rule.

3. Minn. Stat. § 349A.06, subd. 11(b) provides that the director may cancel, suspend or refuse to renew the contract of any Lottery retailer who:

(2) fails to account for Lottery tickets received or the proceeds from tickets sold;

(3) fails to remit funds to the director in accordance with the director's rules;

...

(5) fails to comply with any of the terms in the Lottery retailer's contract;

4. Under Minn. Rule pt. 7856.6010, subp. 2, a contract may be cancelled, suspended or not renewed if a retailer:

C. Failed to account for proceeds from the sale of Lottery tickets;

...

D. Failed to comply with any term or condition of the Lottery retailer's contract;

5. That the Respondent has violated its contract and the rules and the statute cited above by failing to deposit all monies received from the sale of the Lottery tickets in a timely manner in a separate designated bank account.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDED DECISION

IT IS HEREBY RECOMMENDED: that the Director of the Lottery affirm the temporary suspension of the contract of the Respondent and consider permanent disciplinary action against the Respondent's contract.

Dated this 2nd day of February 2000.

S/ George A. Beck

GEORGE A. BECK

Administrative Law Judge

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

Reported: Tape Recorded (2 tapes), No Transcript Prepared.

MEMORANDUM

The Respondent in this case failed to timely deposit lottery funds so as to create a not sufficient funds (NSF) situation on eight occasions between August of 1998 and February of 1999 when the Lottery attempted to sweep its bank account for proceeds due to the Lottery. The Lottery then placed Respondent on a COD basis in March of 1999 and the Respondent performed well on the COD basis. As a result it was returned to the normal "sweep" system in August of 1999. A letter to the Respondent specifically advised it that another NSF situation prior to March of 2000 would result in a suspension of its contract.

At the hearing Mr. Mahmood acknowledged the NSF situations but noted that in each case the NSF amount was collected the subsequent week. He testified that he did not personally see the August 10, 1999 letter warning the Respondent about the consequences of another NSF sweep. He also testified that he had no notice of the December 1999 NSF occurrence and that the Lottery appeared at his store and picked up the tickets and equipment without notice.

However, a Lottery employee testified that she contacted the store on December 13, 1999 and spoke with an employee named Tony about the NSF sweep and advised him that the amount would be included on the next statement with a penalty. Additionally, the retailer billing statement sent to the Respondent and dated December 13, 1999 shows the NSF situation which occurred.

Although it may be that Mr. Mahmood did not see the warning contained in the August 10, 1999 letter until the hearing, the Respondent is responsible for communication within its organization. A certified mail receipt does indicate that the letter was received by somebody at the Respondent's address. At any rate, as the Lottery points out, it is not required to send a warning letter. Violation of the statute and rules through the NSF sweeps is sufficient to support disciplinary action.

Mr. Mahmood feels that his small business received unfair treatment and inadequate notice of the Lottery's intentions in this case. The Lottery has demonstrated a violation, however, since the Respondent violated paragraph XI of its contract. (Findings of Fact No. 3) The notice provided to the Respondent, and the fact that the funds were ultimately collected, may be considered in the Director's determination of an appropriate sanction.

G.A.B.

-
- ^[1] Ex. 5.
^[2] Ex. 4.
^[3] Ex. 5, paragraph XV.3.
^[4] Ex. 5, paragraph XI.
^[5] Ex. 7.
^[6] Ex. 2.
^[7] Ex. 6.
^[8] Ex. 1.